UNITED STATES OF AMERICA
MERIT SYSTEMS PROTECTION BOARD

VALERIE M. BLAKE, Appellant, v. DEPARTMENT OF JUSTICE, Agency.	DOCKET NUMBER CH-0752-97-0402-I-1 DATE: MAR 30 1999

Robert P. Trout, Esquire, and John Thorpe Richards, Jr., Esquire, Trout & Richards, P.L.L.C., Washington, D.C., for the appellant.

Scott D. Cooper, Esquire, Washington, D.C., for the agency.

BEFORE

Ben L. Erdreich, Chairman
Beth S. Slavet, Vice Chair
Susanne T. Marshall, Member

OPINION AND ORDER

¶1 This case is before the Board upon the agency's petition for review and the appellant's cross petition for review of the initial decision, issued on July 21, 1997, that mitigated her removal to a 60-day suspension and a 2-grade demotion. For the reasons set forth below, we DENY the petition, GRANT the cross petition, AFFIRM the initial decision AS MODIFIED, and MITIGATE the penalty to a 45-day suspension and a 1-grade demotion.

BACKGROUND

¶2 In April 1995, the appellant, then the GS-15 Deputy District Director of the Immigration & Naturalization Service (INS) district office in Miami, Florida, and Walter D. Cadman, the Director of the INS Miami district office, learned that a congressional delegation would visit the Miami district. *See* Initial Appeal File (IAF), Tab 31. Arrangements were made for the delegation to visit the INS facilities at concourse E of the Miami International Airport (MIA), where Roger D. Miller was Port director, and the Krome Service Processing Center (Krome), where Constance (Kathy) Weiss, was Officer in Charge/Camp Administrator. *Id*. On June 8, 1995, the appellant held a meeting of MIA and Krome managers to discuss the congressional delegation's visit. *Id*. On June 10, 1995, the congressional delegation arrived and toured the INS facilities at MIA and Krome, as scheduled. *Id*.

¶3 On June 27, 1995, officers of the National Immigration & Naturalization Service Council of the American Federation of Government Employees (union) wrote an open letter to The Task Force on Immigration Reform. They alleged that INS management had deceived the congressional delegation by covering up the actual condition of the INS facilities at MIA and Krome. IAF, Tab 14, Subtab 4z. Cadman was ordered by his superiors to provide a response to the union's allegations. *See* IAF, Tab 14, Subtab 4(a)4. On July 13, 1995, the appellant prepared an initial response for Cadman's signature, and on July 17, 1995, she prepared a follow-up response, using information obtained from her subordinate managers. *See* IAF, Tab 14, Subtabs 4v and 4w. In July 1995, the Department of Justice's Office of Inspector General (OIG) opened an investigation of the alleged cover up. *See* IAF, Tab 14, Subtab 20 (Ex. WWW). The OIG completed its investigative report on June 14, 1996. *Id*.

¶4 Thereafter, the agency effected the appellant's removal based on 2 charges. *See* IAF, Tab 14, Subtabs 4(a)(2) and 4a(4). Charge 1 alleged that the appellant

ordered "departures from policy and practice at MIA and Krome to alter the appearance of District operations for an official delegation."[1] The agency identified specifications A and B under charge 1. Specification A related to MIA and alleged that, during the meeting with MIA and Krome managers on June 8, 1995, the appellant: authorized supervisors to bring on as many people as necessary at MIA to avoid lines during the delegation's visit; ordered that the MIA detention cells in "hard secondary" be kept empty; and ordered that only criminal aliens be kept in the MIA cells during the delegation's visit. Specification B alleges that the appellant ordered a reduction in the Krome populations for the visit. Charge 2 alleged that the appellant "intentionally provid[ed] false information to [her] supervisors, or provid[ed] information with reckless disregard for its truthfulness" about incidents at MIA and Krome. The agency also identified specifications A and B under charge 2. Specification A related to MIA, and alleged that the appellant falsely stated that: additional staff at MIA on June 10, 1995, were there to act as escorts for the 45-member delegation, when the appellant knew or should have known that the delegation would number far fewer than 45; and no inspectors brought in on overtime at MIA on June 10, 1995, were paid any overtime after 5 p.m., which was more expensive for the agency than overtime before 5 p.m. Specification B related to Krome and alleged that the appellant falsely stated that 20 of the criminal aliens removed from Krome were

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[1] We note that charge 1, as stated, does not necessarily state a basis of culpable misconduct, since mere custodial activities may "alter the appearance of District operations." The Board does not construe charges technically, but construes them in context with the specifications supporting them. *See Bonanova v. Department of Education*, 49 M.S.P.R. 294, 298 (1991). Reading charge 1 in context with its supporting specifications in both the appellant's Notice of Proposed Removal and Letter of Decision (incorporating by reference the Notice of Proposed Removal, *see* IAF, Tab 30), it is clear that the agency charged the appellant with instances of misconduct involving alteration of the appearances of operations with the intent to deceive the official delegation regarding the ordinary and normal conditions existing in the District.

transferred out to prevent problems between them and the non-criminal population. *See* IAF, Tab 14, Subtabs 4(a)(2) and 4a(4).

¶5 The appellant petitioned for appeal. *See* IAF, Tab 1. She asserted that she had not engaged in the misconduct charged. *Id*. She also alleged that the agency engaged in harmful procedural error because it imposed a penalty in her case that was more severe than the penalties it imposed in the cases of other agency employees who were disciplined on the basis of charges arising out of the same incident. She alleged further that the deciding official was influenced by improper political pressure from Congress to remove her. *Id.*

¶6 The administrative judge found that the agency proved all of its specifications, and thus both of its charges by preponderant evidence. *See* IAF, Tab 31 (Initial Decision (ID) at 3-11). She also found that the appellant failed to prove her allegations of harmful procedural error and improper political pressure. *Id*. (ID at 11-13). She found additionally, however, that the removal penalty exceeded the bounds of reasonableness. *Id*. (ID at 14). She found further that the agency failed to give substantive consideration to the mitigating factors of the appellant's 20 years of distinguished service (a "long and distinguished record of service to the agency," *id*. at 14), her lack of any prior disciplinary record, and the lack of evidence that the appellant deliberately presented a false or misleading picture of the agency's operations to the congressional delegation. *Id*. The administrative judge found that it was more likely that the appellant's actions were the result of an over-zealous effort to present a "sharp-looking, heads-up group of employees doing their jobs." *Id*. The administrative judge mitigated the penalty to a 60-day suspension and a demotion to an available GS-13 position for which the appellant qualified. *Id*. The administrative judge ordered the agency to provide the appellant interim relief if it filed a petition for review. *Id.*

¶7 The agency has petitioned for review, asserting that the administrative judge erred in mitigating the penalty. *See* Petition for Review File (RF) Tab 1. The

appellant has cross petitioned for review, asserting that the administrative judge erred in sustaining the charges, and in not sustaining the appellant's affirmative defenses. *See* RF, Tab 4. The agency has responded in opposition to the appellant's cross petition. *See* RF, Tab 6. We turn first to the appellant's cross petition for review.

ANALYSIS

The Appellant's Cross Petition for Review

Charge 1, that the appellant ordered "departures from policy and practice at MIA and Krome to alter the appearance of District operations for an official delegation."

Specification A

> During the meeting with MIA managers on June 8, 1995, the appellant: authorized supervisors to bring on as many people as necessary at MIA to avoid lines during the delegation's visit; ordered that the MIA detention cells in "hard secondary" be kept empty; and ordered that only criminal aliens be kept in the MIA cells during the delegation's visit.

¶8 In her cross petition, the appellant alleges that the administrative judge erred in finding that the agency proved that, at the June 8, 1995, meeting, the appellant authorized supervisors to bring on as many people as necessary at MIA to avoid lines during the delegation's visit, in contravention of MIA policy. The administrative judge found that, at the meeting, the appellant recommended that overtime be used to bring on the necessary staff to avoid long lines of arriving passengers in the inspection area, and that she wanted all of the booths in the inspection area staffed during the congressional visit. *See* IAF, Tab 31 (ID at 4). The administrative judge found that, as a result, 10 additional employees were scheduled to work overtime on the day of the visit, June 10, 1995, and most of the booths were staffed. *Id*. The administrative judge did not cite record evidence to

support her findings, and did not make credibility determinations under *Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987), to resolve conflicting evidence on material facts. *See* IAF, Tab 31. This was error. *See Spithaler v. Office of Personnel Management*, 1 M.S.P.R. 587, 589 (1980) (an initial decision must identify all material issues of fact and law, summarize the evidence, resolve issues of credibility, and include the administrative judge's conclusions of law and his legal reasoning, as well as the authorities on which that reasoning rests). Thus, as explained below, we have reviewed the evidence of record independently to determine whether the administrative judge's findings are supported. *See Weaver v. Department of the Navy*, 2 M.S.P.R. 129, 133 (1980), *review denied*, 669 F.2d 613 (9th Cir. 1982) (per curiam).

¶9 Our review of the record shows that the administrative judge erred in finding that the agency proved that the appellant authorized supervisors to bring on as many people as necessary at MIA to avoid lines during the delegation's visit. The record, as cited to below, shows that the appellant authorized no unnecessary overtime, that 3 employees worked with the congressional delegation, an appropriate number to guide the visitors, and that only 16 of 36 booths were staffed at the time of the delegation's visit. *See* Hearing Tape (HT) June 23, 1997, Tape 4A and B; IAF, Tab 20 (Ex. G)

¶10 Agency witnesses Charlene Edwards and Roger Miller testified that the appellant authorized that the booths be full when the delegation visited.[2] *See* HT

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[2] Edwards, an agency witness, testified telephonically over the appellant's objections. *See* HT June 26, 1997, Tape 1A. An appellant has a fundamental right to an in-person hearing on the merits if there is a genuine dispute as to any material fact. *See Evono v. Department of Justice*, 69 M.S.P.R. 541, 545 (1996). When an appellant has a right to an in-person hearing, the administrative judge has no authority to order a telephonic hearing over the appellant's objection. *Id.* Even assuming that the administrative judge erred in allowing the testimony over the appellant's objection, the error did not harm the appellant's substantive rights because, as explained below, the agency did not prove this specification. *See Lowe v. Department of Defense*, 67 M.S.P.R. 97, 100 (1995) (where an administrative judge

June 26, 1997, Tape 1A and B, and Tape 2A.[3] The appellant's witness Paul Candemeres, who was in charge of staffing at MIA for June 10,[4] however, testified that the appellant did not order that the 36 booths on concourse E be fully staffed. *See* HT June 23, 1997, Tape 4A and B. He testified that, if the appellant had ordered such, he would have followed that order. *Id*. He testified that the non-overtime staffing of concourse E at MIA on June 10, at the time of the congressional delegation's visit, was in accord with staffing announced 2 weeks earlier, with no input from the appellant, and before the congressional visit was made known to MIA employees, that is, 16 of the 36 booths were staffed. *Id*; IAF, Tab 20 (Ex. G).

¶11 He testified also that a number of employees worked overtime on June 10, but most did so for reasons other than the congressional visit. *See* HT June 23, 1997, Tape 4A and B. He explained that, on June 8, the airport authority had opened an additional gate, and that this had increased air traffic at about midday on Saturday, June 10. *Id*. He pointed out that on June 3, the Saturday 1 week before the congressional visit, 22 planes arrived at about midday, while on Saturday June 10, 29 planes arrived at midday. *Id*. He explained that passengers from planes arriving at the newly opened gate flowed in concourse B, necessitating INS staff on concourse B. *Id*. He stated that, because the new gate

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improperly holds a telephonic hearing, the Board will carefully scrutinize the record to determine whether the error had a potential adverse affect on the appellant's substantive rights); *Panter v. Department of the Air Force*, 22 M.S.P.R. 281, 282 (1984) (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

[3] The hearing in this appeal lasted 2 days. The first witnesses were heard on June 23, 1997. Because the agency's witnesses were unavailable on the first day of the hearing, the appellant presented her defense before the agency presented its case in chief. The agency presented its witnesses on June 26, 1997. We have designated the tapes by date, number, and side.

[4] References in the Opinion and Order to dates are for 1995 unless indicated otherwise.

had opened recently, INS supervisory personnel at MIA decided to staff concourse B using overtime assignments. *Id*. He pointed out that only 3 of the overtime staff working on June 10, at the time of the congressional delegation's visit, were working on concourse E,[5] which the delegation toured, and that 3 extra personnel were needed to handle the logistics of escorting the delegation, not staffing the booths. *Id*.

¶12 Candemeres' testimony is more credible than that of Edwards and Miller. *See Hillen*, 35 M.S.P.R. at 458. Both Candemeres and Miller (who was Candemeres' second level supervisor) testified that Candemeres had responsibility for following whatever orders the appellant gave in her June 8 meeting. *Id.*; HT June 26, 1997, Tape 2A. Thus, Candemeres' testimony that his actions on June 10 reflected the orders that the appellant gave in the June 8 meeting is credible.

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[5] There is some conflict between Candemeres' testimony and the report that the appellant prepared for Cadman's signature on July 13, 1995. Candemeres testified that 3 employees were called in for overtime because of the congressional delegation. HT 6/23, Tape 4. The July 13, 1995, report states that 7 inspectors and 3 supervisors were assigned to MIA on overtime during the congressional visit. *See* IAF, Tab 14, Subtab 4w. The administrative judge found that "ten additional employees were scheduled to work overtime on June 10, 1995." *See* IAF, Tab 31 (ID at 4). Although the administrative judge's finding is consistent with the report, she does not cite the report in support of her finding. *Id*. We credit Candemeres' live testimony over the report. *See Robinson v. Department of Health & Human Services*, 39 M.S.P.R. 110, 115 (1988) (hearsay evidence may not be sufficiently probative, in light of contradictory live testimony, to sustain an agency's burden by preponderant evidence); *Dubiel v. U.S. Postal Service*, 54 M.S.P.R. 428, 432 (1992) (the probative value of unsworn hearsay statement regarding facts at issue is generally not as great as live testimony regarding same matter). Also, as noted above, Candemeres supported his testimony with corroborating documents, and his testimony was subject to cross examination. *See Hillen v. Department of the Army*, 35 M.S.P.R. 453, 458 (1987). In any event, we note that, in Candemeres' disciplinary proceeding (12 employees were disciplined as a result of the OIG investigation into the INS handling of the June 10, 1995, congressional visit, including Candemeres (7-day suspension), Cadman (separation from Senior Executive Service, reassignment to GS-15, and transfer), and Weiss (demotion to GS-13 and transfer)) the deciding official found no evidence that MIA staffing was out of the ordinary on June 10. *See* IAF, Tab 20 (Ex. Q). Regarding related disciplinary proceedings, *see* footnote 12 herein.

Additionally, Candemeres' testimony is consistent with his prior statements, *see* IAF, Tab 20 (Ex. Q), and is supported by the MIA records of June 10.[6] *Id*. (Ex. G).

Even if the appellant ordered that MIA management expend some overtime on June 8, the record shows that she intended more liberal use of overtime to be a permanent change at MIA, not just a change because of the congressional visit. *See* HT June 23, 1997, Tape 1A; HT June 23, 1997, Tape 3. The record contains substantial testimony that Miller was not doing his job at MIA to the satisfaction of his superiors, including Cadman and the appellant. One of Miller's inadequacies, according to his superiors, was his failure to understand how much overtime he had available for use at MIA and how to use it to effect a more efficient operation there. *See* HT June 23, 1997, Tape 1A; HT June 23, 1997, Tape 3. By Miller's admission, on June 8, immediately following the meeting which is the subject of the charge against the appellant, she and Cadman met with Miller to discuss his performance, including the need for him to use overtime more effectively. *See* HT June 26, 1997, Tape 1.

¶13 The appellant alleges that the administrative judge erred in finding that the appellant ordered that only criminal aliens be kept in the MIA cells during the delegation's visit. The record supports the administrative judge's finding that MIA had no established policy on what types of aliens may be detained in the airport cells. Thus, the administrative judge properly found that the appellant's order set

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[6] The administrative judge refused to accept some of the exhibits that the appellant proffered to support Candemeres' testimony. *See* HT 6/23, Tape 4A and B. The appellant asserts that this was error. Even if it was error, however, the error did not affect the appellant's substantive rights because the agency did not prove this factual allegation. *Panter*, 22 M.S.P.R. at 282 (an adjudicatory error that is not prejudicial to a party's substantive rights provides no basis for reversal of an initial decision).

a policy when there was none, and that she set the policy only for the congressional visit.[7]

¶14 The appellant also asserts that the administrative judge erred in refusing to allow clarifying questions regarding INS policy about keeping children in holding cells at MIA. Administrative judges, however, have broad discretion to control proceedings before them. *See Jones v. Department of the Air Force*, 66 M.S.P.R. 204, 208 (1995); *Niswonger v. Department of the Air Force*, 64 M.S.P.R. 665, 672 (1994). That discretion includes ruling on the probative value of the proffered testimony of witnesses. *See* 5 C.F.R. § 1201.41(b)(3), (8). As noted above, however, the witnesses were clear that INS had no policy in this regard. Thus, there was no need for clarifying questions on the point and the administrative judge did not err in limiting the questioning of Cadman about this INS policy.

¶15 Additionally, the appellant asserts that the administrative judge erred in refusing to hear testimony about what actually happened on June 10 during the congressional visit regarding the holding cells. RF, Tab 4 (PFR at 33). However, what actually happened on June 10 regarding the holding cells is not probative of whether the appellant ordered a departure from usual policy and procedure. Thus, the administrative judge did not err in refusing to hear testimony about whether any children were placed in the holding cells on June 10 and in sustaining this specification. The administrative judge properly sustained specification A of charge 1.

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[7] The appellant contends that the administrative judge erred in addressing the factual allegation in the notice of proposed removal that the appellant ordered that the cells in the MIA be kept empty ("clean") during the congressional visit. *See* IAF, Tab 31 (ID at 4-5); RF, Tab 4 (PFR at 28-33). When the notice of proposed removal and the decision are read together, it appears that the deciding official accepted as true all of the factual allegations supporting charge 1A. Whatever the findings regarding whether the appellant ordered the cells to be kept "clean," specification A of charge 1 is sustained.

Specification B

> The appellant ordered a reduction in the Krome population for the visit.

¶16 The administrative judge found that 77 aliens were moved from Krome in anticipation of the congressional visit. IAF, Tab 31 (ID) at 5-8. Although this finding may be true, it does not address the fundamental issue of the appellant's alleged deceptive intent in ordering departures from policy and practices to alter the appearance of District operations, as charged in the removal decision letter. *See* IAF, Tab 30 (Blake Decision Letter) at 2-3.

¶17 The appellant admits that she ordered a drastic reduction in the Krome population. *See* RF, Tab 4 (PFR at 48). Krome was built to house 210 persons, and on June 8, it housed 377. *See* IAF, Tab 20 (Ex. Y). She asserts, however, that the reduction of the population at Krome was accomplished as a result of the guidance that she obtained from her superiors, who had ordered that the Krome population be reduced to 300 by June 10, and that thus she was following orders. *See* RF, Tab 4 (PFR at 48).[8] It is undisputed that the management at Krome were put under additional pressure to reduce the population when, on June 8, the head of the facility's Public Health Service unexpectedly curtailed the provision of health services because of the overcrowding. *See* HT June 23, 1997, Tape 1.

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[8] The appellant contends that the administrative judge erred in addressing whether the appellant properly permitted her subordinate, Weiss, to reduce the population of Krome by using the "Chris Sale guidelines." *See* RF, Tab 4 (PFR at 45-48). These guidelines modified the detention and parole policy for illegal Cuban aliens. When the notice of proposed removal and the decision are read together, it appears that the deciding official sustained only the specification that the appellant permitted Weiss to depart from usual policy and practice by condoning Weiss' reduction of the Krome population by moving 20 criminal aliens to a Florida jail to "stash them out of sight." *See* IAF, Tab 14, Subtabs 4(a)(2) and 4a(4). We have addressed only the appellant's assertions regarding the charges and specifications that the deciding official sustained.

¶18 The record shows that the appellant's superiors, Michael Devine, Deputy Regional Director, and Carol Chasse, Regional Director of the Eastern Region for INS at the time of the delegation's visit to the Miami facilities, ordered the appellant to reduce the Krome population by 70 to 79 persons by June 10. *See* IAF, Tab 20 (Ex. Y); HT June 23, 1997, Tape 3 (Devine testimony); HT June 26, 1997, Tape 1 (Chasse testimony). Although witnesses testified that this ordered reduction in the Krome population had nothing to do with the congressional visit, it was to be effected by the same date as the congressional visit. *Id.* Further, Chasse admitted that she did not expect the reduction that she ordered to permanently change the overcrowded conditions at Krome. *Id*. She testified that the only way to permanently decrease the Krome population was to close the facility. *Id*.

¶19 The 77 aliens moved from Krome by June 10 is a number consistent with the direction of the appellant's superiors. *Id*. Of these 77, however, 20 were sent to Florida jails, and remained for only a few days. Nineteen of the 20 returned to Krome. *See* HT June 26, 1997, Tape 3. The deciding official focused on these 20 criminal aliens in finding that the appellant ordered departures from policy and practice at Krome to alter the appearance of District operations for an official delegation. *See* IAF, Tab 14, Subtab 4(a)(2). We infer from the decision on the proposed removal and from testimony that aliens were constantly coming and going from Krome, *see* HT June 26, 1997, Tape 3B, that 57 of the aliens moved by June 10 were moved in accordance with current policy, and to keep the population of Krome at a manageable level.

¶20 With regard to the 20 criminal aliens, Weiss informed the appellant on June 9 that they were "stashed out of sight for cosmetic purposes." *See* IAF, Tab 14, Subtab 4cc. The appellant replied "great work so far." *Id*. The appellant's response gives the appearance that she concurred in "stashing" these aliens. The appellant and Weiss explained that Weiss' comment was a poor joke or only a

"flippant remark." *See* IAF, HT June 26, 1997, Tape 3B; Tab 14, Subtab 4(a)3 (Response Transcript at 53). Both the administrative judge and the agency emphasized the appellant's knowledge of and response to Weiss's e-mail message containing these remarks, concluding that the appellant approved of the transfer with the knowledge that it was done without a legitimate reason, *i.e.*, that the sole reason for the transfer was to conceal from the delegation the true population situation at Krome. *See* IAF, Tab 31 (ID) at 7; IAF, Tab 30 (Blake Decision Letter at 3). However, it is clear that Chasse, knowingly ordered population reductions at Krome to coincide with the arrival of the delegation. She thereby effectively established the operative INS policy at the facility, with regard to the movement of the alien population, in effect at the time the delegation arrived and under which Blake was obligated to act. The agency did not charge the appellant with violating any law or regulation applicable to the transfer of any of the aliens affected, and there is no evidence that the transfers were in fact illegal. It is undisputed that Chasse ordered that the reduction be effected by June 10th. It is also undisputed that some of the population reduction measures would have taken place in any event within a day or two of June 10th, notwithstanding the delegation's visit.

¶21 We cannot ignore the fact that the primary impetus for the flurry of activity surrounding the delegation's visit was the desire of management, at the highest levels of the INS, to present an image of a well-run facility staffed by alert and motivated personnel. Chasse, who as Regional Director bore the ultimate regional supervisory responsibility for the actions of all the employees disciplined in connection with the events at issue here, testified that INS Commissioner Meissner had communicated in a telephone conference with subordinates, including Chasse and District Director Cadman, that "she wanted the congressional delegation to see a heads-up can-do group of people that were positive about their work with an attitude that they could get the job done." *See*

Hearing Transcript (HTR) (Chasse testimony) at 10-11 (June 26, 1997). While the appellant obviously must be held accountable on the basis of misconduct personal to her position and responsibilities, we must recognize that she operated within a larger framework of directions, pressures, and expectations, which were created and fostered at a managerial level considerably above that occupied by her, and that the population reductions were unambiguously ordered to be accomplished quickly.

¶22 Chasse, who once held Blake's position at Krome under Cadman (*see* HTR (Cadman testimony) at 105-06 (June 23, 1997)), was long aware of the impending tour. She was quite familiar with the funding and population problems at Krome as well as its supervisory personnel, and she admitted that it was her orders, issued only 1 week prior to the delegation visit, that prompted the expedited and increased efforts to reduce the Krome population even though such reductions were generally anticipated in view of continuing budget and capacity problems of long standing. *See* HTR (Chasse testimony) at 20-21 (June 26, 1977). Contrary to the agency's inferences that Blake could only have had improper motives because of the temporary nature of the population reductions, cited with considerable emphasis in Blake's removal decision letter, *see* IAF, Tab 30 (Blake Decision Letter at 3), Chasse did not expect that the specifically ordered reductions would result in any permanent decrease in the facility population, whether the reductions were accomplished before or after the delegation's arrival. Despite her general intent to have the Krome population permanently reduced as a long-term goal, we can only conclude that the unmistakable specific intent and effect of Chasse's June 2 orders was to reduce the Krome population immediately, "down below the funded and rated capacity levels," to coincide with the arrival of the congressional delegation. *Id*. at 32.

¶23 Chasse frankly acknowledged that her order for such reductions, given to her immediate subordinate, Deputy Regional Director Devine and another employee,

never clearly identified in the record, was that the managers at MIA/Krome were to reduce the population, "whatever it takes." *Id*. at 21. The sense of urgency and importance of the task as conveyed by those words, from one so highly placed in the INS chain of command, cannot be downplayed in considering the background and context of the events giving rise to the specification against the appellant here.[9] Under the circumstances, the appellant cannot be faulted on the basis that the measures she took were not calculated to effect a permanent reduction in the detainee population. The agency had inferred from the temporary nature of the reductions that no legitimate purpose was served by the population reduction measures. *See* IAF, Tab 30 (Blake Notice of Proposed Removal and Blake Removal Decision Letter). However, it is clear from the whole record that the appellant's actions to reduce the detainee population were directed in accordance with the plainly stated objectives and timetable of higher officials at INS, and that, in fact, no action she took to reduce the population pursuant to the directives of these superiors was illegal or otherwise clearly contrary to any other rule or regulation.

¶24 Specification B stands upon a different footing than the sustained aspects of specification A, discussed above. With regard to specification A, ordering that no families be kept in the MIA holding cells only for the duration of the delegation's visit, the appellant personally chose to implement a change affecting a policy or practice clearly within her control, subject to her discretion, and which required her independent judgment as to its potential to mislead the delegation. However, in specification B, the actual agency policy concerning alien transfers at the facility, in effect at the time of the delegation's arrival, was ordered from a place in the chain of command well above the appellant's level. That policy was that

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[9] For her part in the events surrounding the congressional delegation visit, Chasse received a 15-day suspension. *See* IAF, Tab 30 (Decision Letter to Chasse).

the ordered reductions were to be effected immediately, and completed by the delegation's arrival on June 10th.

¶25 Because the appellant's actions in reducing the population were taken under the explicit directions of much more highly placed INS superiors, it serves no useful purpose to examine whether or not these reductions were accomplished in accordance with ordinary agency policies and practices. The new, unambiguous directives from the appellant's superiors obviously superseded existing ordinary policies and practices concerning the movement of alien detainees. The facts that the congressional delegation was a significant factor in establishing that policy, and that Blake was aware that the impending visit influenced the decision, are irrelevant to the appellant's responsibilities to perform the population reduction tasks as ordered. It was never Blake's responsibility or prerogative to determine the rightness or wrongness of Chasse's decision to order specific population reductions at the facility in conjunction with the delegation's visit, or to consider whether the transfers would or would not be deceptive in and of themselves. The intent, if any, to deceive the delegation by these transfers should properly be imputed, not to the appellant, but to the person who issued the order for reductions. *See Rose v. Department of Housing & Urban Development*, 26 M.S.P.R. 356, 360 (1985) (it is "grossly inequitable to suspend an employee for responding to a supervisor's directive, regardless of the employee's perception of the propriety of the order"). We find that the administrative judge erred in finding that the appellant's actions concerning the alien transfers constituted culpable misconduct, and accordingly specification B concerning the alien transfers is not sustained.

¶26 Thus, our review of the record shows that the agency proved 1 of the 2 specifications supporting charge 1: The agency proved that the appellant ordered that only criminal aliens be kept in the MIA cells during the delegation's visit. An agency is required to prove only the essence of its charge. It need not prove each

factual specification supporting its charge. *See Aiu v. Department of Justice*, 70 M.S.P.R. 509, 519, *aff'd*, 98 F.3d 1359 (Fed. Cir. 1996) (Table). Proof of 1 or more, but not all, of the supporting specifications is sufficient to sustain a charge. *See Avant v. Department of the Air Force*, 71 M.S.P.R. 192, 198 (1996). Accordingly, the administrative judge correctly found that the agency proved charge 1, that the appellant ordered departures from policy and practice at MIA and Krome to alter the appearance of District operations for an official delegation.

Charge 2, that the appellant "intentionally provid[ed] false information to [her] supervisors, or provid[ed] information with reckless disregard for its truthfulness" about incidents at MIA and Krome.

Specification A

> The appellant falsely stated that: additional staff at MIA on June 10, 1995, were there to act as escorts for the 45-member delegation, when the appellant knew or should have known that the delegation would number far fewer than 45; and no inspectors brought in on overtime at MIA on June 10, 1995, were paid any overtime after 5 p.m., which was more expensive for the agency than overtime before 5 p.m.

¶27 To sustain a falsification charge, the agency must prove by preponderant evidence that the employee knowingly supplied incorrect information with the intention of defrauding or deceiving the agency. *See Coleman v. Department of the Air Force*, 66 M.S.P.R. 498, 506 (1995), *aff'd*, 79 F.3d 1165 (Fed. Cir. 1996) (Table). While requisite intent can be established by direct or circumstantial evidence, the fact that the employee supplied incorrect information cannot in itself control the question of intent, and plausible explanations are to be considered in determining whether the incorrect information was supplied intentionally. *See Forma v. Department of Justice*, 57 M.S.P.R. 97, 103, *aff'd*, 11

F.3d 1071 (Fed. Cir. 1993) (Table). The issue of the employee's intent to deceive must be resolved from the totality of the circumstances. *See Stein v. U.S. Postal Service*, 57 M.S.P.R. 434, 438-39 (1993).

¶28 Specification A alleged that the appellant falsely reported that she ordered 10 employees to work overtime as escorts for a delegation of 45. *See* IAF, Tab 14, Subtab 4(a)(2). The specification alleged that the appellant knew or should have known that 10 employees would not be needed to escort the delegation because she knew by June 8 that the delegation would not number 45, but closer to 20. *Id*. The appellant alleges that the administrative judge erred in finding that the appellant falsified the July 13 report as specified. *See* PFR at 34-38. The appellant alleges that the report was relaying what the MIA managers believed to be the size of the delegation and how they prepared to escort a delegation of that size. *Id*.

¶29 The administrative judge found that, at the June 8 meeting, Cadman distributed a handout that contained information showing that the actual size of the delegation would be about 20. *See* IAF, Tab 31 (ID 8-9). She found that therefore management knew before the date of the congressional visit that the delegation would be considerably smaller than 45, and that thus the appellant falsely stated that overtime assignments were made because the expected size of the delegation would be 45. *Id.*

¶30 The record shows, however, that, during the June 8 meeting, the appellant conveyed to the supervisors that the delegation would number as many as 60. *See* HT June 26, 1997, Tape 1; HT June 23, 1997, Tape 4. Cadman arrived late at the June 8 meeting, as it was wrapping up, and distributed the information about the anticipated size of the delegation late. *See* HT June 23, 1997, Tape 1. There is no evidence that any of the managers in attendance were aware of the importance of Cadman's last-minute distribution and its relationship to their overtime assignments. These managers, and not the appellant, then assigned some

employees on overtime to assist with the visit, based upon their, and the appellant's, earlier information concerning the delegation's size. *Id.* Further, the evidence indicates that the managers who were responsible for the overtime assignments were not aware until the delegation actually arrived that the number would not be as represented in the verbal discussions at the meeting. *See* HTR (Roger Miller testimony) at 97-98 (June 26, 1997). Thus, the appellant has supplied a plausible explanation for her statement that the overtime employees "were assigned as escorts for the delegation which district management had been told in advance might include as many as 45 representatives and staff." IAF, Tab 13, Subtab 4w; *Deskin v. U.S. Postal Service*, 76 M.S.P.R. 505, 510-14 (1997). Under all the circumstances of this case, the administrative judge erred in finding that the agency established that the appellant's statement in the July 13 report was intentionally false.[10]

¶31 The appellant asserts that the administrative judge's finding that the appellant falsely reported in the July 13 memo that "no inspector had earned 1931 overtime" is contrary to the evidence of record. *See* RF, Tab 4 (PFR at 38-41). The administrative judge found that agency records for June 10 show that "[19]31 Act overtime was incurred by employees who were assigned to work that day because of the congressional visit." IAF, Tab 31 (ID at 9).

¶32 The record shows that by definition 1931 Act overtime, which is more expensive to the agency than other overtime, begins at 5 p.m. and that the delegation was gone before 5 p.m. *See* IAF, Tab 14, Subtab 4(a)2; IAF, Tab 31 (ID at 9). Candemeres testified that the supervisor on duty at 5 p.m. held over

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[10] As noted above, Candemeres' testimony calls into question the accuracy of the report that 10 employees worked overtime on concourse E at the time of the delegation's visit. The gravamen of this charge, however, appears to be that the appellant's explanation for any overtime at MIA at the time of the delegation's visit was false because it relies on a delegation size that she knew that was false.

some employees for specific duties unrelated to the congressional visit. *See* HTR (Candemeres testimony) at 209-10 (June 23, 1997); Appellant's Hearing Exhibit O. Thus, there is no evidence therefore that the congressional visit necessitated the 1931 Act overtime. Even if an employee who was held over at 5 p.m. and received 1931 Act overtime was also an employee who had been called in to assist with the congressional delegation, there is nonetheless evidence that they remained after 5 p.m. to work on assignments unrelated to the congressional visit. *Id*. Thus, the administrative judge erred in finding that the agency established as false the appellant's statement, in the July 13 report, that no overtime assignments were made on the 1931 Act as a result of the congressional delegation.

Specification B

> The appellant falsely stated that 20 of the criminal aliens removed from Krome were transferred out to prevent problems between them and the non-criminal population, rather than that they had been transferred for cosmetic purposes in advance of the delegation's visit.

¶33 The appellant disagrees with the administrative judge's findings sustaining specification B of charge 2. *See* IAF, Tab 14, Subtabs 4(a)(2), 4a(4), 4v, and 4w. As explained above, with regard to 20 criminal aliens, Weiss informed the appellant on June 9 that they were "stashed out of sight for cosmetic purposes." *See* IAF, Tab 14, Subtab 4cc. The appellant replied "great work so far." *Id*. Even if the appellant may have reasonably believed that Weiss's words were no more than some type of “smart” remark, the e-mail containing the information was, under any viewpoint, undeniably relevant to the circumstances being investigated. Blake had no discretion to exercise her personal judgment as to the e-mail's evidentiary weight or to withhold the information. Thus, the record shows that the appellant was aware of Weiss's information, whatever its probative

worth, which contained words which obviously could be construed to reflect poorly on Weiss, Blake, and the operations at Krome. Her conscious omission of that information from the report supports an inference of falsification, even if other legitimate reasons for the alien transfers in question existed. *See, e.g., Hanker v. Department of the Treasury*, 73 M.S.P.R. 159, 164 (1997) (omission of information may constitute falsification in the absence of any plausible explanation for the failure to include the information). The administrative judge therefore correctly sustained this specification.

¶34 Our review of the record shows that the agency proved 1 of the 2 specifications supporting charge 2, that is, that the appellant represented in both her July 13 and July 17 memos that 20 of the criminal aliens removed from Krome were transferred to prevent problems between them and non-criminal aliens at Krome, but intentionally omitted the additional information from Weiss that they had been transferred, at least in part, for "cosmetic purposes" in connection with the delegation's visit. Thus, it was not error for the administrative judge to infer that the appellant either provided false information or provided information with reckless disregard for its truthfulness, because the omission was intended to have a misleading effect. *See* IAF, Tab 30 at 10-11. The second charge was properly sustained. *See Avant*, 71 M.S.P.R. at 198 (proof of one or more, but not all, of the supporting specifications is sufficient to sustain a charge).

Improper Political Pressure

¶35 The appellant also alleges that the administrative judge erred in finding that the deciding official's decision was not influenced by improper political pressure, the ex parte communication from Congressman Smith to the deciding official. *See* RF, Tab 4 (PFR at 62-65); IAF, Tab 31 (ID) at 12-13. The Board has recognized that there is no statutory or regulatory prohibition against ex parte communications between the deciding official and other persons during the

agency's decision making process. *See Anderson v. Department of Transportation*, 59 M.S.P.R. 585, 595 (1993). An improperly motivated ex parte communication to a deciding official by an adversary, however, denies the subsequently discharged employee his rights under the due process clause, taints the investigation, voids the entire proceeding, and renders the deciding official's removal decision a nullity, notwithstanding the removed employee's opportunity to present the ex parte communications issue to the Board on appeal of the merits of the removal decision. *See Sullivan v. Department of the Navy*, 720 F.2d 1266, 1271-74 (Fed. Cir. 1983). *Holm v. Department of Justice*, 40 M.S.P.R. 630, 636 (1988) (key determination is whether ex parte communication improperly predetermined outcome of disciplinary decision).

¶36 The deciding official, David Margolis, testified that he was told by a Department of Justice attorney that Congressman Smith, a member of the congressional delegation visiting MIA and Krome on June 10, had warned that if any of the penalties that the deciding official imposed was less severe than the OIG recommendations, INS would have trouble with Congressman Smith. *See* HT June 23, 1997, Tape 1A and B.

¶37 Congressman Smith's statement, assuming it was in fact uttered and accurately conveyed to Margolis,[11] appears to have put Margolis in the difficult

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[11] Apart from Margolis's testimony, indicating that he assumed the truth and accuracy of the purported statement by Congressman Smith, nothing in the record independently corroborates the substance and conveyance of the remarks. Pursuant to *Sullivan,* it is plain that such evidence of an ex parte communication from a non-disinterested adversary, had it been presented and found credible, could indeed have so tainted the disciplinary decision process that the appellant's due process rights would have been irretrievably compromised. *See Sullivan*, 720 F.2d at 1271-74. Proven, unveiled threats from someone wholly outside the chain of accountability within the Executive Branch, and who is arguably in a position to adversely affect the careers of decision-makers or the welfare of the agency involved for reasons antithetical to the assurance and administration of merit systems principles, will necessarily be subjected to the closest scrutiny. However, given the state of the pertinent evidence before us in this appeal, we need not further consider the alleged remarks, except to

position of trying to render an objective decision in the appellant's case when a member of Congress had already expressed his view that the appellant was guilty. Margolis, however, testified that his job security would not be affected by how he decided the cases and that Congressman Smith's statements did not influence him, and that he would not be told how to decide the cases before him. *Id*. Margolis's denial that he was influenced by Congressman Smith's statement is unwavering. *See* HT June 23, 1997, Tape 1A and 1B. The record contains no other evidence to show that Margolis was influenced by the communication of Congressman Smith's statement. Congressman Smith's statement, therefore, did not constitute the kind of ex parte misconduct that eliminates all due process from the pre-removal administrative process, and rises to the level of clear harmful error. *Cf. Holm*, 40 M.S.P.R. at 636 (improper ex parte communication between agency official and deciding official when deciding official testified that, when he decided issue, the ex parte comment was on his mind). Thus, the administrative judge did not err in finding, in the absence of any other evidence that the penalty determination was influenced by improper political pressure, that the appellant failed to meet her burden of proving that her removal was predetermined or resulted from improper political pressure.

The Agency's Petition for Review

¶38 In its petition, the agency asserts that the administrative judge erred in mitigating the penalty, from removal to a 2-grade demotion and a 60-day suspension, when all of the charges were sustained. *See* IAF, Tab 31 (ID) at 14;

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note that the alleged remarks from Congressman Smith were not directed particularly to the appellant's case, and that, despite the remarks, the agency nevertheless chose to mitigate several penalties from those proposed by OIG following its investigation. *See* footnote 12 herein.

RF, Tab 1, (PFR at 5-8). As explained above, however, the Board has found that, although all of the charges were sustained, 1 of the 2 specifications of each charge was not sustained. When, as here, all of the agency's charges are sustained, but not all of the underlying specifications are sustained, the agency's penalty determination is entitled to deference and should be reviewed to determine whether it is within the parameters of reasonableness. *See Payne v. U.S. Postal Service*, 72 M.S.P.R. 646, 650-51 (1996). The Board will give deference to an agency decision that demonstrates reasoned consideration of mitigating factors and reaches a responsible judgment that a lesser penalty is inadequate. *See Bivens v. Tennessee Valley Authority*, 8 M.S.P.R. 458, 461 (1981). However, the penalty must be assessed based upon a proper and complete consideration of the record evidence pertinent to the *Douglas* factors. Where the Board finds that this evidence reveals that the agency has failed to weigh relevant factors, it may determine how the agency's decision should be corrected to bring the penalty within the parameters of reasonableness. *See Robb v. Department of Defense*, 77 M.S.P.R. 130, 136 (1998).

The penalty of removal is not within the bounds of reasonableness for the sustained offenses.

¶39 The agency asserts that the deciding official extensively considered each and every factor of *Douglas v. Veterans Administration*, 5 M.S.P.R. 280, 306 (1981), in his decision letter and outlined that consideration again in his testimony. *See* HTR (Margolis testimony) at 15-19 (June 23, 1997). The administrative judge found that the deciding official failed to give substantive consideration to a number of mitigating factors, such as, the appellant's 20 years of service, her outstanding ratings and awards, her lack of a disciplinary record, and the fact that she had no personal motive for her actions. *See* IAF, Tab 31 (ID at 13); *Wynne v. Department of Veterans Affairs*, 75 M.S.P.R. 127, 134 (1997) (because there was

no record evidence showing that the agency gave substantive consideration to the *Douglas* factors, the Board would balance the relevant factors without deference to the agency-imposed penalty). We see no reason to disturb the administrative judge's determination that the deciding official's treatment of each mitigating factor cited in the decision letter was insufficiently substantive. We further agree that the deciding official failed to consider additional mitigating circumstances surrounding the offense, and that the deciding official failed to properly consider all of the relevant *Douglas* factors. *See* IAF, Tab 14, Subtab 4(a)(2); *Douglas*, 5 M.S.P.R. at 306. Importantly, the administrative judge and the deciding official both failed to consider the mitigating factors of the appellant's rehabilitation potential and the exemplary nature of the penalty.

¶40 Based on our review of the record, we concur with the administrative judge that the appellant set out to present a good picture of INS employees doing their jobs, not to deceive Congress. *Id*. (ID at 14). Among several factors motivating the appellant's actions, the appellant's supervisors encouraged her to present INS employees in a favorable light to the congressional delegation. *See* HT June 23, 1997, Tape 1; IAF, Tab 20 (Exs. B and C). Further, for reasons unrelated to the congressional visit, they ordered the reduction of the Krome population at the same time as the congressional visit. *See* HT June 23, 1997, Tape 3; IAF, Tab 20 (Ex. Y). Additionally, the appellant was under pressure from the Public Health Service physician who served Krome to reduce the population there for health reasons. *See* HT June 23, 1997, Tape 1. None of these circumstances demonstrate a deliberate intent to deceive Congress.

¶41 Moreover, the deciding official failed to consider relevant evidence that was available in the record before him, but which he did not review. Contrary to the deciding official's findings, the appellant acknowledged, in a sworn deposition during the investigation that led to the charges, that she would have acted differently at the time of the congressional visit if she had known then what she

learned by the time of the investigation. *See* Vol. VI, OIG/Blake transcript at 456. The deciding official apparently was unaware of this statement. He testified that he did not review the entire OIG/Blake transcript, but nevertheless relied upon his recollection that the appellant had said "that there was nothing wrong with what was done and that she wouldn't do things differently in the future. That weighed heavily on my mind." HTR (Margolis testimony) at 16 (June 23, 1997). However, the record shows that his recollection is of his own conclusion in his decision letter to Blake, and not of the statements of the appellant. His recollection conflicts with the appellant's oral statement quoted in Blake's decision letter, wherein the appellant reiterated her belief that she had not acted improperly and that "I can think of nothing that I could have done differently to prevent this from happening. It's a regrettable incident." IAF, Tab 14, Subtab 4(a)(2) at 6. This statement, concerning her judgment of her past actions based upon the state of knowledge she had at the time of the events at issue, does not support the deciding official's conclusion that she would behave no differently under similar circumstances in the future. *Id*. This is the only citation, in either the appellant's removal decision letter or the deciding official's testimony, relating to the deciding official's implicit finding that the appellant had no rehabilitative potential. We find that the deciding official did not consider available record evidence plainly relevant to the consideration of the appellant's potential for rehabilitation, and that his negative conclusion under that *Douglas* factor cannot be supported.

¶42 The administrative judge considered penalties assessed against other supervisors in positions immediately above and below the appellant, a mid-level manager. *See* IAF, Tab 30 (agency decision letters for Deputy Regional Director Devine, District Director Cadman, Assistant District Director Powers, and Supervisory Detention and Deportation Officer, Officer in Charge/Camp Administrator Constance Weiss). It facially appears that the first 3 of these

supervisors exercised somewhat comparable levels of responsibility and autonomy, and the misconduct alleged against them in general was substantially as serious as that leveled against the appellant. At the agency decision level, the agency imposed a 1-grade demotion against Devine and Powers, and a 1-grade demotion and transfer against Weiss. Cadman voluntarily accepted a demotion from the Senior Executive Service and a transfer. *Id*. Of these, the administrative judge found that only Weiss's circumstances involved charges similar enough to invite direct comparison. She determined, however, that Weiss's and the appellant's levels of responsibility as supervisors were too disproportionate to permit a finding of the imposition of a disparate penalty. *See id*., Tab 31 at 11-12. We see no basis to disturb the administrative judge's findings.[12] Further, it is

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[12] As the administrative judge stated, the agency took disciplinary actions arising from the circumstances of this case against 12 employees (*see* IAF, Tab 31 (ID) at 11). Thus, it appears likely that the administrative judge implicitly considered the agency's disciplinary decisions for 11 INS employees besides the appellant who were disciplined. *See id*. Of the 4 supervisors referred to above, only Devine and Weiss pursued their appeal rights before the Board. Regarding Devine, charged with neglect of duty, providing false statements to supervisors with reckless disregard as to their truth or falsity, and failure to cooperate in an official investigation (*see* IAF, Tab 30 (Devine Decision Letter)), none of the agency's charges was sustained, and the Initial Decision became a final order of the Board, absent a petition for review from the agency, on August 4, 1998. *See* Initial Decision, MSPB Docket No. BN-0752-97-0106-I-1 (June 30, 1998). Similarly, in the appeal of Weiss (MSPB Docket No. BN-0752-97-0417-I-1), no charges were sustained, and the agency's petition for review was denied by the Board on March 26, 1998. *Weiss v. Department of Justice*, 79 M.S.P.R. 261 (1998) (Table). The agency settled its charges against both Cadman and Powers prior to any proceedings before the Board. The agency had alleged 2 charges against Powers: ordering and/or taking actions that created a false appearance to an official delegation, and knowingly providing false information in an official capacity, which are substantially identical to the charges made against the appellant here. The agency proposed a 2-grade demotion and a transfer, but ultimately, pursuant to a settlement agreement, the agency imposed a 1-grade demotion and transfer upon Powers. *See* IAF, Tab 30 (Decision letter to Powers). While the agency also initially proposed to remove Cadman, the appellant's immediate supervisor, based on charges of ordering departures from policy and practice to alter the appearance of District operations for an official delegation, and intentional provision to supervisors of false information, or with reckless disregard for its truthfulness, his case was resolved through a settlement agreement requiring his voluntary separation from the Senior Executive Service,

the Board's long-standing rule that an agency is not required to explain lesser penalties imposed against other employees whose charges were resolved by settlements. *See, e.g.*, *Dick v. U.S. Postal Service*, 52 M.S.P.R. 322, 325 (1992), *aff'd*, 975 F.2d 869 (Fed. Cir. 1992) (Table).

¶43 The appellant's misconduct remains serious even absent the specifications found not sustained. However, a penalty commensurate with a substantial lapse of sound managerial judgment to ensure a presentation of an undistorted picture of agency operations, when a reasonable person in her position should have been aware of the misleading potential of her actions, is appropriate rather than a penalty commensurate with an active, malevolent design to deceive Congress, as alleged by the agency. *Cf. Vanover v. Department of Energy*, 21 M.S.P.R. 296, 299-300 (1984) (charges of deliberate and willful abuse of position of authority for personal gain, deliberate misrepresentation and concealment of facts in connection with an investigation, and mismanagement of property sustained upon fewer than all specifications; sustained charges "demonstrated a deficiency in the appellant's performance as a supervisor in managing his subordinates;" penalty of demotion to nonsupervisory position and 60-day suspension appropriate), *aff'd*, 770 F.2d 177 (Fed. Cir. 1985) (Table). The sustained misconduct of altering practices and appearances in connection with the congressional visit was not primarily motivated by a desire to mislead Congress, although the appellant's actions were certainly improperly influenced by the fact of the long-scheduled congressional delegation's tour of the historically overcrowded and underfunded facilities. However, a variety of factors, including chronic persistent overcrowding, health concerns, and security considerations played legitimate and significant roles in the appellant's action.

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reassignment and transfer to a GS-15 position in Washington, D.C. *See id.* (Notice of Proposed Removal to Cadman). IAF, VOL II, Tab QQQ at 1 (Cadman letter to Margolis).

¶44 Moreover, the deciding official testified during the hearing that an important motivation for choosing the penalty of removal based on all of the charges and specifications was to make an example of the appellant to other employees. *See* HTR (Margolis testimony) at 15, 17 (June 23, 1997). Exemplary punishment is generally contrary to the *Douglas* factors, and we find it inappropriate here. *See Harper v. Department of the Air Force*, 61 M.S.P.R. 446, 448 (1994).

¶45 What remains, therefore, is the judgment, reflected in the initial decision as modified by this Opinion, that the appellant misjudged her duty and discretion to carry out her responsibilities in a manner calculated to avoid an appearance of impropriety in connection with the delegation's inspection visit. She subsequently further misjudged her obligation, incumbent upon supervisors and subordinates alike, to provide full, prompt, and completely accurate information to her supervisors and investigators concerning her actions, by withholding information, i.e., the e-mail communication from Weiss stating that a group of aliens had been stashed out [of] sight "for cosmetic purposes," that bore directly upon the matters being investigated. These failures are the essence of the sustained charges.

¶46 Where, as here, all of the charges are sustained upon fewer than all the specifications, but the penalty originally imposed is beyond the bounds of reasonableness, the Board will mitigate the penalty only to bring it within those bounds, i.e., the maximum reasonable penalty under the circumstances. In applying the maximum reasonable penalty standard, the Board must take into consideration the agency's failure to sustain all of its supporting specifications. *Payne*, 72 M.S.P.R. at 651. This is particularly so in light of our findings that the penalty selection was made upon the basis of evidence of rehabilitative potential that was not considered, without a full consideration of all relevant mitigating factors, and as exemplary punishment. *Robb*, 77 M.S.P.R. at 136. We note that the sustained specifications, while serious, simply do not rise to the same level of gravity as the unsustained specifications, considered alone or in combination, that

were relied upon for the choice of removal. The Board has repeatedly stated, as to misconduct which includes falsification charges, that there is no per se rule regarding the penalty to be imposed. Rather, we examine the totality of the circumstances surrounding the misconduct. *See, e.g., Gunn v. U.S. Postal Service*, 63 M.S.P.R. 513, 518 (1994); *Stein*, 57 M.S.P.R. at 441 (1993).

¶47 While it is proper to infer the existence of an intentional deceit element in both of the sustained charges, it is also clear that the intentional nature of the appellant's acts was of a significantly different character and degree than was charged by the agency. Additionally, only charge 1, sustained upon only 1 specification, involved an element of deceiving Congress. We have determined, in view of the whole record, that the appellant was not the official responsible for originating INS's policy of reducing the alien population at Krome because of the impending arrival of the delegation. Charge 2 alleged that the appellant deceived her supervisors, not Congress, and we sustained charge 2 for the reason that the appellant had no discretion to withhold any relevant information in her reports.

¶48 In view of the agency's failure to prove all of the alleged specifications, the appellant's more that 20 years of service, the absence of any previous disciplinary record, her outstanding performance ratings and awards for outstanding service, her lack of any motive for personal benefit, the isolated and apparently aberrant nature of her misconduct, and her potential for rehabilitation, we conclude that her culpability in these events does not warrant removal. We therefore find that the maximum reasonable penalty under all the circumstances is a 1-grade demotion and a 45-day suspension. *See Shelly v. Department of the Treasury*, 75 M.S.P.R. 677, 682-85 (1997) (removal penalty mitigated to a 1-grade demotion in light of the sustained charge for exercise of poor judgment). *Cf. Jackson v. U.S. Postal Service*, 48 M.S.P.R. 472, 474-75 (1991) (for supervisory 12-year employee with unblemished disciplinary record, removal beyond the parameters of reasonableness for first disciplinary offense, involving charges of poor

management practices and supervisory judgment, and falsification; penalty mitigated to demotion to nonsupervisory position with least reduction in pay and grade); *Ballenger v. U.S. Postal Service*, 21 M.S.P.R. 741, 743 (1984) (removal unreasonable in light of unblemished disciplinary record of 11-year nonsupervisory employee; penalty mitigated to a 30-day suspension).

ORDER

¶49 We ORDER the agency to cancel the appellant's removal and to substitute a 1-grade demotion and a 45-day suspension. *See Kerr v. National Endowment for the Arts*, 726 F.2d 730 (Fed. Cir. 1984). The agency must accomplish this action within 20 days of the date of this decision.

¶50 We also ORDER the agency to issue a check to the appellant for the appropriate amount of back pay, interest on back pay, and other benefits under the Office of Personnel Management's regulations, no later than 60 calendar days after the date of this decision. We ORDER the appellant to cooperate in good faith in the agency's efforts to compute the amount of back pay, interest, and benefits due, and to provide all necessary information the agency requests to help it comply. If there is a dispute about the amount of back pay, interest due, and/or other benefits, we ORDER the agency to issue a check to the appellant for the undisputed amount no later than 60 calendar days after the date of this decision.

¶51 We further ORDER the agency to inform the appellant in writing of all actions taken to comply with the Board's Order and of the date on which the agency believes it has fully complied. If not notified, the appellant should ask the agency about its efforts to comply.

¶52 Within 30 days of the agency's notification of compliance, the appellant may file a petition for enforcement with the regional office to resolve any disputed compliance issue or issues. The petition should contain specific reasons why the appellant believes that there is insufficient compliance, and should include the dates and results of any communications with the agency about compliance.

¶53 This is the final order of the Merit Systems Protection Board in this appeal. 5 C.F.R. § 1201.113(c).

NOTICE TO THE APPELLANT REGARDING FEES

You may be entitled to be reimbursed by the agency for your reasonable attorney fees and costs. To be reimbursed, you must meet the criteria set out at 5 U.S.C. §§ 7701(g) or 1221(g), and 5 C.F.R. § 1201.202. If you believe you meet these criteria, you must file a motion for attorney fees WITHIN 60 CALENDAR DAYS OF THE DATE OF THIS DECISION. Your attorney fee motion must be filed with the regional office or field office that issued the initial decision on your appeal.

NOTICE TO THE APPELLANT REGARDING
FURTHER REVIEW RIGHTS

You have the right to request the United States Court of Appeals for the Federal Circuit to review the Board's final decision in your appeal if the court has jurisdiction. *See* 5 U.S.C. § 7703(a)(1). You must submit your request to the court at the following address:

United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

The court must receive your request for review no later than 60 calendar days after receipt of this order by your representative, if you have one, or receipt by

you personally, whichever receipt occurs first. *See* 5 U.S.C. § 7703(b)(1).

FOR THE BOARD: _____

Robert E. Taylor
Clerk of the Board

Washington, D.C.